BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY SUE WHITE	)	
Claimant	)	
VS.	)	
	)	Docket No. 258,814
MONTGOMERY KONE, INC.	)	
Respondent	)	
AND	)	
	)	
ZURICH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 1, 2001 Award of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded a 73 percent permanent partial general disability based upon a 46 percent task loss and a 100 percent loss of wages. The Appeals Board (Board) held oral argument on May 3, 2002.

APPEARANCES

Claimant appeared by her attorney, Orvel B. Mason of Arkansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Edward D. Heath, Jr., of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant, a small parts assembler, began working for respondent in January 1999. On September 13, 1999, while picking up a stack of pendants, which were stacked ten high and weighed between 3 and 5 pounds each, she felt a sudden onset of pain in the left side of her neck and into her head. She stated it was a pain like she had never felt before. She first sought chiropractic treatment with Lawrence Brooks, D.C., on September 15, 1999. When the chiropractic treatment provided no relief, she contacted the hospital and spoke with family physician Dr. David Ross. He initially provided her with pain medication, and she was ultimately referred to David A. Schmeidler, M.D. (Dr. Ross's partner and the designated company physician for respondent). Dr. Schmeidler first saw claimant for this condition on November 2, 1999, at which time he performed a physical examination and tentatively diagnosed a herniated cervical disc. He recommended an MRI, which was performed and which displayed degenerative changes at C5-6 with spondylosis and spondylolisthesis. The MRI indicated claimant had a compromised cervical spine with foraminal encroachment and bony spurring. On November 3, 1999, he discussed the findings with claimant and returned claimant to work with restrictions. Claimant did return to work at an accommodated position. Claimant was also referred for an FCE on June 27, 2000. Dr. Schmeidler utilized this FCE when he placed the restrictions on claimant, which he felt should be permanent. By July 26 or 27, 2000, Dr. Schmeidler felt claimant had reached maximum medical improvement.

Claimant was assessed a functional impairment by both Dr. Schmeidler and osteopathic physician Frederick R. Smith, D.O., who examined claimant on November 6, 2000. However, the parties have stipulated to an 8 percent whole body functional impairment, thereby rendering the functional impairment opinions of the doctors irrelevant for the purposes of this Award.

Dr. Schmeidler was provided a job task list prepared by James T. Molski. After reviewing the list, Dr. Schmeidler felt that claimant was incapable of performing twelve of the twenty-six tasks on the list, for a task loss of 46 percent. There were originally twenty-eight tasks on the list. However, two of the tasks on the list were tasks that claimant had performed prior to the 15 years before her date of accident.

Dr. Smith also placed restrictions on claimant and, when provided the task list that had been shown to Dr. Schmeidler, Dr. Smith felt claimant could no longer perform six of the twenty-six tasks on the list. However, during cross-examination, Dr. Smith modified his task assessment, indicating that some of the tasks he had initially said claimant could do, he felt that she might not be able to do depending upon the circumstances. Ultimately, his task loss opinion very closely resembled that of Dr. Schmeidler.

Claimant continued working for respondent until October 19, 2000, when she was laid off during a general, plant-wide layoff.

For several years prior to her accident, claimant had been involved in other part-time, income-producing activities apart from her employment with respondent. She

is paid $7 an hour for 14 hours a week by RCIL, a home health agency, for assisting in the care of her 80-year-old mother. That earns claimant $98 per week. She also runs a private establishment called the Unique Boutique, of which she is the sole owner. She has operated this store since 1986. The parties stipulated that the income claimant generates from these two jobs has not substantially changed since 1986 with the Unique Boutique and since 1998 with the RCIL income.

After being laid off from respondent, claimant began seeking other employment. She also applied for and began receiving unemployment compensation, which she received through March 2001. She continued searching for jobs through April 12, 2001. She then became busy with her boutique business through approximately May 5, 2001, because it was prom season. Claimant testified at the regular hearing that she would resume her job search as soon as the prom season rush slowed down.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[1] K.S.A. 1999 Supp. 44-510e defines permanent partial general disability as:

> [T]he extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Here, there are two task opinions in the record. The Board finds the opinion of Dr. Schmeidler to be the more credible, as Dr. Smith wavered considerably on cross-examination regarding what tasks claimant could and could not perform. Ultimately, Dr. Smith's opinion was close to that of Dr. Schmeidler. The Board finds, based on the opinion of Dr. Schmeidler, that claimant has lost the ability to perform 46 percent of the tasks that she performed during the 15-year period preceding the accident. This does eliminate the two tasks contained in Mr. Molski's list, which claimant performed prior to the 15-year period set forth in K.S.A. 1999 Supp. 44-510e.

With regard to claimant's actual wages, respondent contends that the income earned from RCIL and from the gross sales of claimant's boutique should be considered as part of claimant's post-injury earnings, but not part of her pre-injury wage. If both were combined, then claimant would be earning greater than 90 percent of the income she was earning while working for respondent. K.S.A. 1999 Supp. 44-510e(a) states that if a claimant is receiving wages equal to 90 percent or more of the average weekly wage that the employee was earning at the time of the injury, then claimant's disability would be

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[1] See K.S.A. 44-501 and K.S.A. 44-508(g).

limited to her functional impairment. The Board acknowledges that claimant is earning wages from the two jobs above listed. However, those jobs are both activities which claimant had been performing for several years before her accident. In fact, the boutique business claimant has owned with little, if any, modification of income since 1986.

The Kansas Workers Compensation Act has traditionally been viewed as "one unit in an overall system of wage-loss protection . . . ."[2] If the Board were to accept respondent's argument, then the wages that claimant lost when she suffered her injury and her layoff with respondent would be replaced by income which claimant had already been generating over a several-year period. This would not result in wage-loss protection to claimant under the Workers Compensation Act, but instead would penalize her for her industrious work habits. The Administrative Law Judge found, and the Board concurs, that claimant has suffered a significant wage loss which was not affected by her continued self-employment efforts. "The primary purpose of workers' compensation benefits is partial replacement of actual or potential wage loss."[3]

In order to properly compute the amount of wage loss which claimant has suffered, the wages that claimant was earning for her two separate, part-time jobs must be disregarded both before and after her injury because the income generated from those jobs did not change. In doing so, the Board finds the wage loss suffered by claimant from the injuries suffered with respondent constitutes 100 percent of the wages claimant was earning with respondent. Therefore, the Board finds that claimant has sustained a 100 percent wage loss and is entitled to a work disability under K.S.A. 1999 Supp. 44-510e based upon that finding.

In considering both the wage and task losses found above, the Board finds claimant has suffered a 73 percent permanent partial general disability for the injuries sustained on September 13, 1999.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 1, 2001, should be, and is hereby, affirmed in all respects.

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[2] *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

[3] *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987).

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Orvel B. Mason, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and Its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation